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No. 99-901

IN THE

# Supreme Court of the United States

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**BRENTWOOD ACADEMY,**
***Petitioner,***

**v.**

**TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,**
***Respondents.***

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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## BRIEF FOR PETITIONER

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61 pp

## QUESTION PRESENTED

Whether the regulatory conduct of a nominally private secondary school athletic association, which "establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee," *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n.*, 190 F.3d 705, 706 (6th Cir. 1999) (Merritt, J., dissenting from the denial of petition for rehearing *en banc*) and whose "membership consist[s] entirely of institutions located within the same State, many of them public institutions created by the same sovereign," *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), constitutes state action under the Fourteenth Amendment and under 42 U.S.C. §1983.

## RULE 29.6 STATEMENT

As an independent not-for-profit school, Brentwood Academy has no parent corporation and has issued no shares of stock.

## TABLE OF CONTENTS

*Page*

QUESTION PRESENTED ..... i

RULE 29.6 STATEMENT ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

PRELIMINARY STATEMENT ..... 14

A State Action in Precedent: The Lower Appellate Courts ..... 16

B. State Action in Theory: Protecting A Bona Fide Private "Area of Individual Freedom" ..... 19

C. The School Choice Concern ..... 24

D. The Accountability Concern ..... 26

SUMMARY OF ARGUMENT ..... 27

ARGUMENT ..... 29

I. This Court's Analysis in *Tarkanian* Requires Reversal ..... 29

*Page*

A. The Regulatory Conduct of TSSAA Constitutes State Action ..... 30

1. The Analysis in *Tarkanian* and Footnote 13 ..... 30

2. Conduct of Public Officials Acting in an Official Capacity And of Organizations They Control Is Presumptively State Action ..... 32

3. The Public or Private Status of The Institution Being Regulated is Analytically Irrelevant Under *Tarkanian* Footnote 13 ..... 36

B. Government May Not Absolve Itself of Constitutional Accountability By Delegating a Function it is Obligated to Provide ..... 39

C. Even If TSSAA Be Deemed a Private Entity, It Acts Jointly With Public Officials and Under The Joint Participation Principle TSSAA Acts Under Color of State Law ..... 46

II. Reversal is Required Because TSSAA's Regulatory Conduct Is State Action As TSSAA Has Received "Significant Encouragement" from the State ..... 48

CONCLUSION ..... 50

## TABLE OF AUTHORITIES

*Page(s)*

### FEDERAL CASES

*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) ..... 42, 47

*American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977 (1999) ..... 20, 23, 29, 35, 39, 43

*Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690 (N.D. Tex. 1998) ..... 17

*Barnhorst v. Missouri State High Sch. Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980) ..... 15

*Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922 (8th Cir. 1976) ..... 27

*Bingham v. Oregon Sch. Activities Ass'n*, 37 F. Supp. 2d 1189 (D. Ore. 1999) ..... 17

*Blum v. Yaretsky*, 457 U.S. 991 (1982) ..... 20, 29, 48, 49

*Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) ..... 18

*Bowsher v. Synar*, 478 U.S. 714 (1986) ..... 33, 34

*Brenden v. Independent Sch. District 742*, 477 F.2d 1292 (8th Cir. 1973) ..... 18

*Brewer v. Purvis*, 816 F. Supp. 1560 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir. 1995), *cert. denied*, 514 U.S. 1111 (1995) ..... 17, 18

**Table of Authorities (continued)**

*Page(s)*

*Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961) .. 43, 47

*Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) ..... 18, 32

*Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729 (W.D. Mich. 2000) ..... 14, 16, 17, 36, 39

*Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315 (7th Cir. 1992) ..... 17

*Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990) ... 26

*Dennin v. The Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663 (D. C[illegible]n.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) ..... 19

*Dennis v. Sparks*, 449 U.S. 24 (1980) ..... 36, 46

*Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) ..... 20, 23, 29, 39, 43, 44, 45, 49

*Evans v. Newton*, 382 U.S. 296 (1966) ..... 22, 45, 46

*Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) ..... 20, 22, 32, 45, 46

*Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992) ..... 27

*Georgia v. McCollum*, 505 U.S. 42 (1992) ..... 45

**Table of Authorities (continued)**

*Page(s)*

*Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) .. 22, 45

*Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671 (7th Cir. 1987) ..... 17

*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) ..... 20

*Jordan v. Indiana High Sch. Athletic Ass'n*, 813 F. Supp. 1372 (N.D. Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994) ..... 17

*Kelley v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485 (M.D. Tenn. 1968) ..... 32

*Lebron v. National Railroad Passenger Ass'n*, 513 U.S. 374 (1995) ..... 21, 22, 23, 32, 33, 36, 39, 42

*Libby v. The South Inter-Conference Ass'n*, 28 F. Supp. 504 (N.D. Ill.), *aff'd*, 921 F.2d 96 (7th Cir. 1990) ..... 17

*Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968) . 17, 26, 32, 37

*Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) ..... 19, 20, 28, 32, 46

*Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) ..... 22, 31, 33, 34

*Meyer v. Nebraska*, 262 U.S. 390 (1923) ..... 24, 25

**Table of Authorities (continued)**

*Page(s)*

*Mistretta v. United States*, 488 U.S. 361 (1989) ..... 22

*Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121 (3d Cir. 1978) ..... 17

*NCAA v. Smith*, 119 S. Ct. 924 (1999) ..... 27, 41

*NCAA v. Tarkanian*, 488 U.S. 179 (1988) .... 13, 14, 16, 20, 27, 28, 29, 30, 31, 32, 35, 36, 37, 39, 41, 47

*O'Connell High Sch. v. The Virginia High Sch. League*, 581 F.2d 81 (4th Cir. 1978) ..... 18

*Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957) ..... 22, 33

*Pierce v. Society of Sisters*, 268 U.S. 510 (1925) ..... 24, 25

*Polk County v. Dodson*, 454 U.S. 312 (1981) ... 34, 35, 37, 45

*Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) ..... 20, 22, 46

*Robbins v. Indiana High Sch. Athletic Ass'n*, 941 F. Supp. 786 (S.D. Ind. 1996) ..... 19

*West v. Atkins*, 487 U.S. 42 (1988) ..... 21, 22, 23, 27, 28, 32, 33, 34, 39, 42, 43, 45

*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) ..... 29, 43, 49

*In re United States ex rel Missouri State High Sch. Activities Ass'n*, 682 F.2d 147 (8th Cir. 1982) ..... 18

**Table of Authorities (continued)**

*Page(s)*

*United States v. Price*, 383 U.S. 787 (1966) ..... 47

*Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 579 (1999) ..... 27

**STATE CASES**

*Archbishop Walsh High Sch. v. Section VI of the N.Y. State Pub. High Sch. Athletic Ass'n*, 666 N.E.2d 521 (N.Y. Ct. App. 1996) ..... 18, 19

*Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222 (Ind. 1997) ..... 17, 18

*Indiana High Sch. Athletic Ass'n v. Schafer*, 598 N.E.2d 540 (Ind. Ct. App. 1992) ..... 17

*Israel v. West Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480 (W. Va. 1989) ..... 18

*Kleczak v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734 (R.I. 1992) ..... 18

*Mississippi High Sch. Activities Ass'n, Inc. v. Coleman*, 631 So. 2d 768 (Miss. 1994) ..... 18

*Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ..... 8, 9, 42

*Warren v. Polk County Bd. of Educ.*, 613 S.W.2d 222 (Tenn. 1981) ..... 9

**Table of Authorities (continued)**

*Page(s)*

*White v. Banks*, 614 S.W.2d 331 (Tenn. 1981) ..... 9

**FEDERAL STATUTES**

28 U.S.C. § 1254(1) ..... 1

42 U.S.C. §1983 ..... 1, 42

**STATE STATUTES**

T.C.A. §8-35-118 ..... 5

T.C.A. §49-1-102(c) ..... 9

T.C.A. §49-1-302 ..... 10

T.C.A. §49-6-1002 ..... 9, 15

T.C.A. §49-6-3001 ..... 10

T.C.A. §49-6-2116 ..... 11

## OPINIONS BELOW

The opinion of the court of appeals is reported at 180 F.3d 758 (6th Cir. 1999), and is set forth as Appendix A to the Petition for Writ of Certiorari [references to those appendices will hereinafter be cited with a CP prefix]. The order of the court of appeals denying the petition for rehearing *en banc* and Judge Merritt's dissent from the denial of rehearing *en banc* (CP 1-C) are reported at 190 F.3d 705 (6th Cir. 1999). The opinion of the United States District Court for the Middle District of Tennessee (CP 1-B), granting petitioner's motion for partial summary judgment and issuing a permanent injunction, is reported at 13 F. Supp.2d 670 (M.D. Tenn. 1998).

## JURISDICTION

The Sixth Circuit entered judgment on June 21, 1999. Petitioner timely filed a petition for rehearing *en banc* on July 2, 1999. On August 30, 1999, the Sixth Circuit denied petitioner's petition for rehearing *en banc*. The petition for writ of certiorari was filed on November 29, 1999, and was granted on February 22, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 are set forth at CP 1-D.

## STATEMENT OF THE CASE

The issue presented for resolution in this Court is the state-action status of the regulatory conduct of the Tennessee Secondary Schools Athletic Association (TSSAA). The primary underlying constitutional issue in this matter is petitioner's facial and as applied First Amendment free speech challenge to the TSSAA Recruiting Rule, JA-115-19.

Petitioner is a co-educational, independent, college-preparatory school. Like its counterparts in most states, TSSAA is a nominally private association composed primarily of public schools and local public school officials

and governed during the relevant period exclusively by public high school principals or certain other qualified public school officials (all public employees serving in an ex officio capacity). JA-24. TSSAA coordinates, supervises, and regulates interscholastic athletic competition among public and private high schools in Tennessee.

TSSAA's Recruiting Rule, which is similar to comparable rules in most states, bars independent schools from taking the initiative in contacting or communicating with prospective student-athletes individually or in targeted groups for any reason. The district court held that the Recruiting Rule violated the First Amendment both facially and as applied. CP 37-58-B. In reversing, the Sixth Circuit held that the regulatory conduct of TSSAA in formulating and implementing the Recruiting Rule did not constitute state action. CP 7-18-A.

The Recruiting Rule. The Recruiting Rule prohibits the use of "undue influence" on a student or the parents or guardians of a student "to secure or retain a student for athletic purposes." The term "undue influence" is defined as "exceeding what is appropriate or normal." CP 6-B.

The terms "appropriate or normal" are not defined. *Id.* at 37-B. Instead, the Recruiting Rule sets forth a number of examples of conduct that constitutes "undue influence" per se. These per se rules bar independent schools from taking the initiative in communicating with or contacting prospective student-athletes individually or in a targeted group for any reason. *Id.* at 6-10-B, 37-40-B. The district court found that the Recruiting Rule's "ban has the effect of preventing any influence on a student, not just 'undue' influence." (emphasis in original). *Id.* at 48-B.

Since the prohibition on initiating contact applies to students "with or without an athletic record," *id.* at 6-B, private schools are at risk if they initiate contact with any prospective students individually – even those without an athletic record – in case those students should, if they enroll, subsequently decide to participate in interscholastic athletics.

That risk can only be obviated if the school is willing to bar such students from interscholastic athletics. Such a broad policy would be unfair to students and detrimental to the mission and competitiveness for students of an independent school such as petitioner.

Contact with prospective students may not be initiated "by any person connected, or not connected, with the school." *Id.* Private or parochial schools may not contact students enrolled at the public schools, and public schools may not contact private school students. *Id.* at 39-40-B. A broad exception to the ban on contact applies when either public or private schools contact "feeder" schools;[1] with respect to these "feeder" schools, far-reaching initial and targeted contact is permitted so that recruiting can take place essentially without restraint. As a practical matter, this "feeder pattern" exception does not typically apply to private schools, such as petitioner. *Id.* TSSAA has "not explained the purpose for the feeder school exception."[2] *Id.* at 47-48-B.

The Recruiting Rule Violation. The district court held the Recruiting Rule unconstitutional on its face and as applied. The "as applied" violation stemmed from a letter sent in April 1997 by petitioner's head football coach to all new incoming male students. *Id.* at 13-B. The letter was purely informational; it set forth the dates in May for spring football practice and invited the students to attend if interested. The letter was sent only to new students who had already applied, had been accepted for admission, and had signed a contract to attend petitioner the next fall. *Id.* The letter was followed by a telephone call to the parents of each of the students to

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[1] A "feeder pattern" exists where a middle school sends a large number of students to a particular high school each year. The term "feeder pattern" is not defined in the TSSAA rules. CP 40-B.

[2] The district court made the following observation about the "feeder pattern" exception: "If conveying information to student-athletes about opportunities to attend out-of-zone schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of 'feeder schools.' The TSSAA cannot have it both ways." *Id.* at 47-48-B.

reaffirm that participation in spring practice was entirely optional. *Id.* at 14-B. The students who received the letters were entering high school and, therefore, had to change schools as they were graduating from middle school.

TSSAA regulations allow the students who received the letters and whose parents received the calls to participate in spring practice. Sending the letters and making the telephone calls, however, constituted a Recruiting Rule violation. In other words, it was legal for the incoming students to participate, but illegal for the school to communicate with them about practice. The specific language of the communications was not determinative of the violation. The communications themselves constituted "initial contact ... by a member of the coaching staff or representative of the school" and therefore "undue influence" on the contacted students. *Id.* at 12-13-B.[3]

Despite finding that there was "no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials," TSSAA placed the school's entire athletic program on probation for four years, suspended the football and boys' basketball programs from TSSAA playoffs for two school years (1997-1999), and imposed a $3000 fine. *Id.* at 17-18-B & n.1.

The TSSAA

Role and Mission. The purpose of TSSAA, as set forth in its Constitution, is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." JA-87. It has no other independent role or function.

TSSAA recognizes that it has an integral role in Tennessee's public and private secondary school educational process. TSSAA acknowledges that "the primary objective of

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[3] TSSAA found petitioner to have committed two other rules violations. One involved petitioner's alleged failure to monitor the provision of free tickets to a Brentwood Academy football game to two prospective students by an unaffiliated middle school coach. The other involved an alleged violation of the off-season practice rule. JA-114-15, 281-83. Neither of these claimed violations is directly at issue at this stage of the litigation.

all secondary schools is to educate youth" and that education encompasses both athletic and scholastic components. As poignantly stated in TSSAA's Constitution, "[t]he athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work." While the "athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other." TSSAA "aims to co-ordinate the athletic and scholastic programs" of Tennessee's public and private secondary schools. *Id.*

Composition and Governance. Like comparable organizations in other states, TSSAA is a nominally private association of public, independent, and parochial secondary schools from across Tennessee. It is composed of 290 public schools and 55 independent and parochial schools. Public high schools comprise 84% of the voting membership; independent and parochial schools comprise 16% of the voting membership. JA-23, ¶12.

With the exception of a few schools that concentrate on special education, JA-214, all public high schools in Tennessee (those that participate in interscholastic athletics) are members of TSSAA. JA-217. As the district court found, TSSAA's "rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics." CP 32-B "TSSAA admits it is the only organization providing these benefits to the public secondary schools in Tennessee." *Id.* at 28-B & n.7. Employees of TSSAA, including Executive Director (and defendant) Carter, are covered by the state retirement system, and, by statute, are included in the definition of "teachers" for that purpose. T.C.A. §8-35-118; CP 33-B.

TSSAA's administrative authority lies with a Board of Control. TSSAA rules and regulations are enacted by a Legislative Council. Both the Board of Control and the Legislative Council are nine-member bodies elected by popular vote in each of nine electoral districts. Eligibility for

election to both bodies is based on official status and is limited to high school principals, assistant principals, or qualified superintendents. JA-89, 92; CP 5-B. Public high school administrators who serve on the Legislative Council and the Board of Control attend the meetings as part of their official duties – *i.e.*, on school time when the meetings occur while school is in session – and typically receive reimbursement for expenses from their schools for attendance at meetings. JA-39-40, 298.

"All members of the Legislative Council [and the Board of Control] must be principals or superintendents," although an assistant principal "who devotes full time to administrative duties" is also eligible to serve. JA-89, 92. The election of members of the Board of Control and the Legislative Council takes place at an annual meeting. Each member school within the district is entitled to one vote, provided that the school is "represented at the [annual] meeting by the principal, or other faculty member." *Id.*

When petitioner was disciplined, all the voting members of the Legislative Council and the Board of Control were public school administrators, JA-24, ¶15, and therefore public employees.

Regulatory Function. TSSAA's very purpose – and its sole function – is to "regulate the athletic relations of the secondary schools in Tennessee." JA-87. As the district court found,TSSAA's "very existence is entirely dependent upon the absolute cooperation and support of the public school systems of the State of Tennessee." CP 35-B. (internal quote omitted).

Member schools must, in effect, qualify under Tennessee's compulsory education law and pay annual dues. JA-40, 98-99. A substantial portion of TSSAA's annual revenue comes from receipts for TSSAA football and basketball championship tournaments. JA-40, ¶24. Many of the athletic contests between member schools are played in state-owned facilities or on state-owned properties. *Id.*

TSSAA exercises regulatory power in determining what schools the public schools of Tennessee may compete against in interscholastic athletics. As the district court found, TSSAA's "rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics." CP 32-B. TSSAA can "suspend, ... fine, or otherwise ... penalize any member school for the violation of any" TSSAA rule or, more generally, "for other just cause." JA-100.

Under Article III, Section 1 of TSSAA's by-laws, member schools may only play or scrimmage against schools approved by TSSAA. JA-126-28. This effectively gives authority to TSSAA to set criteria and to approve or disapprove interscholastic athletic opponents for all public high schools in the state with interscholastic athletic teams.

TSSAA rules blanketly allow member schools to play or scrimmage against other TSSAA members. TSSAA allows member schools to play non-member high schools if those schools qualify under the state's compulsory attendance law, provided that the TSSAA Executive Director approves in writing. JA-127. No standards exist to guide the discretion of the Executive Director in the exercise of his approval power. A public school seeking to play a non-member private school must therefore secure case-by-case approval by TSSAA's Executive Director, whose discretion to approve or disapprove such contests is not subject to written standards or criteria. Similarly, a non-member private school cannot schedule a game against a public school without the specific written approval of TSSAA's Executive Director. *Id.*

That TSSAA regulates schools in their official capacity is apparent.[4] For example, a school seeking reinstatement after suspension must have its "principal and the Board of Education ... agree in writing that the school will abide by all the rules of [TSSAA] in the future." Not only the principal

[4] TSSAA also regulates non-school activities of individual students. For example, a student eligible to play in TSSAA-sanctioned activity is effectively barred from participating in a church, synagogue, or YMCA league. JA-107-08.

but "each member of the Board of Education shall sign the statement."[5] JA-100.

For a school to be a member of TSSAA, its coach must have a Tennessee state teaching license, must be a full-time employee of the Board of Education, and must be paid entirely from funds approved by the Board of Education or the governing body of the school. CP 33-B.

Under TSSAA rules, it is the duty of the host school to provide "sufficient security to insure orderly conduct on the part of all spectators." Schools "are responsible for the conduct of their own fans and students at every athletic contest, regardless of where it may be held." JA-137.

Further, the role of a school's principal in TSSAA is one that involves that principal in his or her official capacity as administrative head of the school. It is the principal of each school who is responsible to TSSAA "in all matters pertaining to the athletic relations of his school." JA-138. That is, the principal or the "administrative head" of a school is held responsible for the school's "observance of TSSAA regulations." *Id.*

The Regulation of Education in Tennessee

The Duty of the State to Provide Free Education Through Public Schools. The Tennessee Constitution guarantees school children the "right to a free public education," *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993), and imposes on the state a duty to "provide for the maintenance, support and eligibility standards of a system of free public schools." Article XI, Section 12. That state duty

[5] A flavor of the sweep of regulation can be gleaned from the Transfer Rule, JA-109, and the Residence Rule. JA-113. These rules present special challenges for a student whose parents move to a new community (all transfer students must be "approved by the Executive Director" before being allowed to participate, JA-109-10), a student whose parents divorce, and a student facing partial-year custody with a non-parent guardian such as a grandparent (such an arrangement could result in total ineligibility for a student's entire high school years).

cannot be avoided by delegation to local governments. *McWherter*, 851 S.W.2d. at 156.

Tennessee law requires that "[t]here shall be a local public school system operated in each county or combination of counties. There may be a local public school system operated in a municipality or special school district." T.C.A. §49-1-102(c). There is also a provision for a "local board of education" and a "superintendent or director." *Id.*

Salaries of teachers are set at the discretion of the local board of education. T.C.A. §49-6-1002(c). "There is no certification of coaches, as such, in Tennessee." *White v. Banks*, 614 S.W.2d 331, 332 (Tenn. 1981). However, teacher/coaches typically receive salary supplements for their role as coach through contractual agreements with the school or school district. *Id.* Complaints about athletic success are directed at public educational officials. The perception of the schools' local constituents is that school officials are responsible for and accountable for athletic success. *See Warren v. Polk County Bd. of Educ.*, 613 S.W.2d 222, 222-23 (Tenn. 1981).

Decisions about a public school's athletic program are within the overall jurisdiction of local public school officials and constitute part of the administration of the overall public educational program. Local public school officials are responsible for maintaining an appropriate balance in the use of school time between the athletic and non-athletic components of education. For example, it is unlawful for a public school principal or teacher to dismiss students during regular school hours to play a sports game "without written permission from the governing board of the institution." T.C.A. § 49-6-1002(a). Thus, control over the allocation of time for playing or practicing for interscholastic sports remains with local public school authorities as part of their overall educational responsibility.

The Duty of Parents to Have Their Children Attend School. Tennessee has a compulsory school-attendance law. The state imposes a duty on parents or others responsible for

raising a child aged six through seventeen to "cause such child or children to attend public or non-public school." T.C.A. §49-6-3001(c)(1). A "public school" is "any school operated by a local education agency ... with public funds." T.C.A. §49-6-3001(c)(3)(B). A non-public school can be a "church-related school, home school, or private school." T.C.A. §49-6-3001(c)(3)(A). To qualify as a "private school," a school must be approved by the state or accredited by an organization approved under rules promulgated by the State Board of Education. T.C.A. §49-6-3001(c)(3)(A)(iii).

The Role and Conduct of the State Board of Education. Under Tennessee law, the State Board of Education (SBE) has authority to develop and maintain a "master plan for the development of public education, kindergarten (K) through grade twelve (12)," to set licensing standards for public school teachers and administrators, to set graduation requirements, and to set policies governing curricula and courses of study. T.C.A. §49-1-302(a)(4), (5), (6), (8). In addition, the SBE has authority to promulgate rules for state approval of accrediting bodies that certify "private schools" to qualify under the state's compulsory attendance law. T.C.A. §49-6-3001(c)(3)(A)(iii).

SBE has adopted various curriculum frameworks to provide the "basis for planning instructional programs in each local school system." SBE Rule 0520-1-3-.05 (JA-220). These "contain broad goals and objectives which identify the minimum content required at each grade level and for each course." One such framework focuses on physical education. SBE Rule 0520-6-10-.01 *et seq.* (JA-250). The rationale for instruction in physical education in high school is that it helps "achieve the lifetime goal of personal fitness." *Id.* at 6-10-.03 (JA-252). Participation in games and organized sports is a "strand" in SBE's physical education curriculum, *id.* at 6-10-.04 (JA-252), with the "concept" being that "[i]ndividuals enjoy team sports as participants and spectators," and learn "[t]o understand rules and strategies employed in games/sports." *Id.* at 6-10-.06 (JA-254).

Courses in physical education may be offered for credit towards graduation from high school as part of a high school's "[a]cademic program." Under SBE guidelines, "[p]articipation in interscholastic athletics ... may be substituted for the physical education requirement" for graduation "in accordance with local board of education policies." *Id.* Thus, as the district court found, "students get academic credit for TSSAA activities." CP 34-B.

SBE has established criteria for approval of non-public school accrediting agencies. Rule 0520-7-2-.03 (JA-255). One requirement is that such an agency publish and follow minimum standards regarding "curriculum and graduation" when accrediting private schools. One required minimum curriculum standard is that the "program shall include ... physical education." *Id.* at 0520-7-2-.03(6)(c)(9)(i)(I) (JA-258). Thus, a private school seeking to qualify under Tennessee's compulsory attendance law by receiving accreditation from an agency approved by SBE must include a program in physical education.

Public schools transport students to school-sponsored events such as interscholastic athletic contests. State law contemplates this and authorizes local school authorities to use "vans" on contract with private vendors to transport students "to and from an interscholastic athletic or other interscholastic or school sponsored activity." T.C.A. §49-6-2116. SBE guidelines limit the use of "[v]an type equipment" to "transport not more than 15 students to and from interscholastic athletic and other interscholastic or school sponsored activities." SBE Rule 0520-1-5-.02 (JA-246).

The Relationship Between SBE and TSSAA. Since 1925, SBE has recognized the function of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee. CP 10-B. In 1972, by rule, SBE officially designated TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis." *Id.* at 23-B. The SBE also

determined that the SBE "Chairman ... shall designate a person or persons to serve in an ex-officio capacity on the [TSSAA] Board of Control and Legislative Council." *Id.*; JA-211. The district court found that SBE representatives "attended more than twenty TSSAA Board of Control or Legislative Council meetings from 1990 through 1997." CP 34-B; JA-177-98.

In 1972, SBE approved the then-current rules and regulations of TSSAA (including the Recruiting Rule) and reserved the right to review and approve the appropriateness of future changes, a power it regularly exercised. CP at 10-11-B, 24-26-B. SBE viewed TSSAA as "the agency [designated] to govern secondary athletics for the Board," *id.* at 24-B, reaffirming "the Board's decision to delegate responsibility for management of secondary school athletics to TSSAA." *Id.* at 25-B.

In sum, SBE has long recognized that "TSSAA works as an agent on behalf of the State Board of Education." *Id.* SBE's Executive Director noted that "[c]ompetitive athletics is a big part of the high school experience" and that TSSAA "manages these activities as sanctioned by the State Board of Education." *Id.* at 25-26-B.

In 1995, apparently in response to court cases holding TSSAA's regulatory conduct to be state action, JA-173, SBE adopted the following rule: "[SBE] recognizes the value of participation in interscholastic athletics and the role of [TSSAA] in coordinating interscholastic athletic competition. [SBE] authorizes the public schools of the state to voluntarily maintain membership in [TSSAA]." CP 26-B.

Under the 1995 revision, SBE no longer "designate[d]" TSSAA as the official organization for supervision and regulation of secondary school athletics but instead "recognize[d]" TSSAA's long-held role as being of "value." Further, the 1995 revision singled out TSSAA by name to serve in the same role it had traditionally played. The district court (CP 26-27-B) found that even after the 1995 revision:

> the conduct of the parties has not materially changed.... [T]he connections between TSSAA and

> the State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed. In short, the rule amendment had no material effect.... Tennessee, through custom and practice, then explicitly, and then through custom and practice again, has recognized TSSAA as the official body for the regulation and control of interscholastic athletics. A mere change in the words of the regulation, apparently to avoid a litigation claim of state action, did not change the actual conduct of the State and did not change the actual conduct of the TSSAA....

The Proceedings Below

The district court found the Recruiting Rule unconstitutional, both on its face and as applied, as a violation of the First Amendment right of expression and enjoined its enforcement. 13 F. Supp.2d 670. The Sixth Circuit reversed, holding that the SBE's revocation of its official designation of TSSAA to regulate and organize interscholastic athletics negated TSSAA's status as a state actor. 180 F.3d at 763-66.

Further, the Sixth Circuit held that it was not bound by this Court's "comments" in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), which it deemed not to be "controlling." 180 F.3d at 766. In *Tarkanian*, this Court noted that the regulatory conduct of a high school athletic association whose "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign" would be state action. That situation "of course" contrasted with a national association such as NCAA whose decisions could not fairly be attributed to a single state (in that case Nevada).

Despite the fact that this Court in *Tarkanian* footnote 13 approvingly cited two high school athletic association cases in which those associations were held to be state actors, and even though one of those cases involved a private school claiming racial discrimination on the part of the association, the Sixth

Circuit held that footnote 13 did not apply when a high school athletic association such as TSSAA dealt with a private school such as petitioner. *Id.*[6]

In a subsequent case arising in the Sixth Circuit and raising very similar issues regarding the state-action status of the regulatory conduct of a high school athletic association, a district court refused to follow the Sixth Circuit decision herein under review. *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d 729 (W.D. Mich. 2000).[7] The district court was convinced that the Sixth Circuit's decision in the *Brentwood Academy* case was so at odds with this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), as to place the district court at risk of violating its duty to this Court's primacy in our judicial hierarchy.

The court in *Communities for Equity* found such a "serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*," 80 F. Supp.2d at 742, that it could not follow *Brentwood Academy* and still be faithful to this Court's decision in *Tarkanian*. According to the *Communities for Equity* court, the "Sixth Circuit's decision in *Brentwood Academy* misstates the Supreme Court's reasoning in *Tarkanian* [footnote 13]," *id.*, and for that reason it was deemed "not controlling." *Id.* The court followed *Tarkanian* footnote 13 and not "the *Brentwood Academy* decision ... [which] cannot be reconciled with Footnote 13 in *Tarkanian*...." *Id.*

## PRELIMINARY STATEMENT

"Extracurricular activities" in general and interscholastic athletics in particular "are an important component of an

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[6] The Sixth Circuit rejected a petition for rehearing *en banc* "[a]lthough a substantial minority of the active judges ... voted for en banc review...." 190 F.3d at 706 (Merritt, J., dissenting).

[7] The district court decision in *Communities for Equity* is reprinted as Appendix A to petitioner's Reply to Respondents' Brief in Opposition.

education in today's modern society." *Barnhorst v. Missouri State High Sch. Activities Ass'n*, 504 F. Supp. 449, 457 (W.D. Mo. 1980). This is hardly a recent insight as the ancient proverb *mens sana in corpore sano* (a sound mind in a sound body) attests specifically regarding the relationship between athletics and education. Athletics keep your mind fit, help motivate, and teach values. That is why they are part of a well-rounded K-12 curriculum. Public school officials have jurisdiction over athletics. See T.C.A. §49-6-1002(a)(appropriate allocation of school time between athletics and other components of education is the responsibility of public school officials). These same public officials control TSSAA.

In a submission to the Sixth Circuit, Chester E. Finn, Jr. and Daniel Casse, nationally recognized education and public policy experts, asserted that "[e]xtracurricular activities in general and sports in particular can serve as pathways to opportunity for children from disadvantaged backgrounds." CP 10-E. They noted the importance of motivation in the educational process, concluding that "like art, drama, and journalism," athletics "can provide the motivation to learn," serving as the "hook to get the attention of students and rivet it on the core curricular mission of the schools." While athletes may stay in school because of their interest in sports, "learning and the pursuit of knowledge can be infectious." *Id.* at 11-E.

SBE has recognized that "[c]ompetitive athletics is a big part of the high school experience. . . .TSSAA manages these activities as sanctioned by the [SBE]." CP 25-26-B. Under state law, participation in interscholastic athletics may be substituted for the physical education graduation requirement. Thus, students get academic credit for TSSAA-regulated activities. *Id.* at 34-B. In addition, any private school seeking accreditation by an agency approved by SBE (under SBE Rule 0520-7-2-.03 [JA-255]) must include a program in physical education. One of the minimum curriculum standards for

accreditation is that the "program shall include ... physical education." *Id.* at 0520-7-2-.03(6)(c)(9)(i)(I) (JA-258).

The district court concluded that "interscholastic athletics are intricately connected to the educational process," CP 33-B, and that there is a "close identification" of TSSAA with the State's "provision of education." *Id.* at 36-B. TSSAA acknowledges as much in its Constitution: "The athletic field and the gymnasium are classrooms" for "teaching ... character, integrity, sportsmanship, and team work." TSSAA "aims to co-ordinate the athletic and scholastic programs" of Tennessee's secondary schools, recognizing that the "physical" and "mental" components of education "complement[]" each other. *Id.* at 33-B. And responsibility for the overall educational program rests with Tennessee's public high schools and their principals, who control TSSAA.

A. State Action in Precedent: The Lower Appellate Courts

The Sixth Circuit's decision is out of sync with this Court's footnote 13 in *NCAA v. Tarkanian*, 488 U.S. at 193 n.13, and with every other appellate court to decide the state-action status of the regulatory conduct of high school athletic associations. Affirmance of the decision of the Sixth Circuit herein would unsettle and destabilize uniformly settled law.

As Judge Merritt concluded in his dissent to the denial of the petition for rehearing *en banc*, the decision of the Sixth Circuit below is "inconsistent with" this Court's *Tarkanian* footnote 13. 190 F.3d at 707. The court in *Communities for Equity* stated the same conclusion more pointedly: there is a "serious disconnect" between *Tarkanian* footnote 13 and the decision below, the "Sixth Circuit's decision in *Brentwood Academy* misstates [and "misapplies"] the Supreme Court's reasoning in *Tarkanian* [footnote 13]," and the decision under review herein "cannot be reconciled with Footnote 13 in *Tarkanian*." See *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d at 742-43. Without exception, every other case that mentions *Tarkanian* footnote

13 has concluded that, under it, the regulatory conduct of a nominally private high school athletic association constitutes state action.[8]

The Sixth Circuit's state-action holding "contradicts the uniform case law in the field from other circuits and is inconsistent with the clearly established constitutional theory of state action." 190 F.3d at 706 (Merritt, J., dissenting). At no stage of this litigation has TSSAA cited appellate authority from outside the Sixth Circuit holding a high school athletic association not to be a state actor.

Judge Merritt correctly stated in his dissent that the state action holding in this case is inconsistent with the explicit state action doctrine on this issue from the Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits.[9] It is also

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[8] *See Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F. Supp.2d 729, 742-43 (W.D. Mich. 2000)(finding that the regulatory conduct of a high school athletic association constituted state action); *Brewer v. Purvis*, 816 F. Supp. 1560, 1574-75 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir. 1995), *cert. denied*, 514 U.S. 1111 (1995) (holding that "an athletic association whose membership is predominated by institutions created by the same sovereign is a state actor"); *Libby v. The South Inter-Conference Ass'n*, 728 F. Supp. 504, 506-07 (N.D. Ill.), *aff'd*, 921 F.2d 96 (7th Cir. 1990) (same); *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting from holding but agreeing that *Tarkanian* footnote 13 requires a finding of state action); *Bingham v. Oregon Sch. Activities Ass'n*, 37 F. Supp. 2d 1189, 1192-93 (D. Ore. 1999); *Barnett v. Texas Wrestling Ass'n*, 16 F. Supp. 2d 690, 696 (N.D. Tex. 1998); *Jordan v. Indiana High Sch. Athletic Ass'n*, 813 F. Supp. 1372, 1377 (N.D. Ind. 1993), *vacated as moot*, 16 F.3d 785 (7th Cir. 1994); *Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Indiana High Sch. Athletic Ass'n v. Schafer*, 598 N.E.2d 540, 547-50 (Ind. Ct. App. 1992).

[9] See *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121, 125 (3d Cir. 1978) ("[T]he parties concede that ... state action is present"); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-28 (5th Cir. 1968) ("There can be no substantial doubt that conduct of the affairs of LHSAA is state action" and the nominally private status of LHSAA "cannot obscure the real and pervasive involvement of the state in the total program") (cited approvingly in *NCAA v. Tarkanian*, 488 U.S, 179, 193 n.13 (1988)); *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) (though like TSSAA a

inconsistent with controlling doctrine in the Fourth[10] and Eleventh[11] Circuits. Further, the decision of the Sixth Circuit in this case conflicts with all state supreme court decisions that have addressed the question, which, as Judge Merritt observed, "have held that their high school interscholastic athletic associations are state actors."[12] *Id.*

Indeed, recent cases from outside the Sixth Circuit have treated the state action status of high school athletic

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"voluntary association," IHSA had an "overwhelmingly public character" because of the public character of its membership); *In re United States ex rel Missouri State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) ( MSHSAA rules were state action because of nature of its composition); *Brenden v. Independent Sch. Dist. 742*, 477 F.2d 1292, 1295 (8th Cir. 1973) (integral involvement of member public school districts in League's decisionmaking process constituted state action); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (AIA a state actor because the "member public schools play a substantial role in determining and enforcing the policies and regulations of the AIA" and because the AIA "rulemaking procedure integrally involve[d] the member schools and school districts in the decision making process") (cited approvingly in *NCAA v. Tarkanian*, 488 U.S at 193 n.13).

[10] Virginia's role in administering its analogous high school athletic association is even more explicit than was the case in the other circuit cases. *See O'Connell High Sch. v. The Virginia High Sch. League*, 581 F.2d 81, 83 (4th Cir. 1978) (parties stipulated to existence of state action).

[11] The Eleventh Circuit adopted as binding the established precedent of the Fifth Circuit prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). Prior to that date, the Fifth Circuit had held that the regulatory conduct of a high school athletic association comparable to TSSAA was state action. *See supra* note 9. The state action status of the regulatory conduct of a high school athletic association is settled in the Eleventh Circuit. *See Brewer v. Purvis*, 816 F. Supp. 1560, 1575 (M.D. Ga. 1993), *aff'd*, 44 F.3d 1008 (11th Cir. 1995), *cert. denied*, 514 U.S. 1111 (1995) (noting that "[t]raditionally, courts have found that high school athletic associations are state actors").

[12] *See Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Public High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996); *Mississippi High Sch. Activities Ass'n, Inc. v. Coleman*, 631 So.2d 768, 773-74 (Miss. 1994); *Kleczak v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 735-36 (R.I. 1992); *Israel v. West Va. Secondary Schs. Activities Comm'n*, 388 S.E.2d 480, 484 & n.4 (W. Va. 1989).

associations as clearly established settled law: "Actions of voluntary interscholastic associations, of which public schools comprise part of the membership, constitute state action." *Dennin v. The Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996).[13] Therefore, affirming the Sixth Circuit in this case would unsettle law that has been uniformly settled for over thirty years,[14] creating instability.

B. State Action in Theory: Protecting A Bona Fide Private "Area of Individual Freedom"

This Court has explained that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982). The concern about protecting an autonomous private realm has no place where, as here, no bona fide private organization or private realm exists. Applying constitutional principles to TSSAA's regulatory conduct endangers no "area of individual freedom".

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[13] *See also Robbins v. Indiana High Sch. Athletic Ass'n*, 941 F. Supp. 786, 791 (S.D. Ind. 1996) ("The IHSAA is an organization whose very existence is entirely dependent upon the absolute cooperation and support of the public school system of the State ... and is subject to constitutional scrutiny as a state actor...."); *Archbishop Walsh High Sch. v. Section VI of the N.Y. State Public High Sch. Athletic Ass'n*, 666 N.E.2d 521, 522 (N.Y. Ct. App. 1996) ("Preliminarily, everyone agrees that the actions of Section VI constitute state action....").

[14] The Sixth Circuit did not refer to any of this case-law from other circuits. Judge Merritt noted that he "could find no circuit or state supreme court decision supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts." 190 F.3d at 706-07. The Sixth Circuit also cast aside earlier circuit precedent, including cases implicitly acknowledging TSSAA's state-action status, because those cases pre-dated the so-called *Blum* trilogy and were therefore "supercede[d]" [sic]. 190 F.3d at 706. But *Tarkanian* and all cases following it were decided well after *Blum* was handed down. And no other circuit has thought that *Blum* required reconsideration of its precedent in this area. The state-action status of the regulatory conduct of high school athletic associations has been regarded as settled law both before and after *Blum*.

Maintenance of a public realm, subject to the Constitution, and a private realm, beyond the scope of constitutional scrutiny, permits "citizens to structure their private relations as they choose" without constitutional accountability. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991). It also "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936.

The state-action concern about preserving "an area of individual freedom" beyond the scope of constitutional scrutiny assumes that the organization whose activity is under challenge is "private" – *i.e.*, that a "private party has taken the decisive step that caused the harm to the plaintiff." In such situations, "the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *NCAA v. Tarkanian*, 488 U.S. at 192.

In that typical case, the "private" entity is controlled and governed by private parties[15] and has a "private" character and mission. In the performance of that independent mission, the "private entity performs a function which serves the public." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). By itself,

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[15] *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (noting that the entity whose conduct was challenged "was a heavily regulated privately owned utility" whose private character absent government regulation was undisputed; defendants were self-evidently private parties); *See also American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 985-86 (1999) (noting that all parties agreed that "the *public officials* responsible for administering the workers' compensation system ... are state actors" but holding that a "*private insurer's* decision to withhold payment for disputed medical treatment" was not fairly attributable to the state)(emphasis in original); *Blum v. Yaretsky*, 457 U.S. 991, 1008 & n.19 (1982) (holding that "medical judgments made by private parties according to professional standards that are not established by the State" are not fairly attributable to the state, even in context of public benefits program such as Medicaid, and noting that the medical judgments were "made by concededly private parties"); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (noting that, in a constitutional challenge to a warehouseman's sale of goods under the Uniform Commercial Code, "no public officials" were named as defendants).

the performance of a public function by a private entity does not constitute state action. *Id.* The goal of state-action analysis in such cases is to determine "where the governmental sphere ends and the private sphere begins." *Edmonson*, 500 U.S. at 620.

But this assumes that, with respect to the conduct or to the entity under challenge, there is, to begin with, a "private" sphere ("an area of individual freedom") warranting preservation. Such an assumption is, however, unfounded in the present case, in which a critical threshold question is whether TSSAA can fairly be characterized as in the "private sphere" in the first place. *Cf. Lebron v. National Railroad Passenger Ass'n.*, 513 U.S. 374, 378 (1995) (Amtrak "not a private entity but Government itself" for First Amendment purposes). There is no constitutional interest in shielding from constitutional scrutiny ostensibly "private" conduct that is in reality governmental in character.

TSSAA is organized, controlled and governed by public entities and by public officials acting ex officio. *See West v. Atkins*, 487 U.S. 42, 49-50 (1988)("[G]enerally, a public employee acts under color of state law while acting in his official capacity"). TSSAA pursues "governmental objectives," *Lebron*, 513 U.S. at 400, by exercising regulatory authority over an important component of Tennessee's educational system – interscholastic athletics. See Petition for Writ of Certiorari at 18-19 & Appendix E (submission of Chester E. Finn, Jr. and Daniel Casse). TSSAA is not a private organization structured by private parties unrelated to the state or local governments. It is not a privately owned and operated institution that sells services to the state. Nor is it a private company with a private board and a nongovernmental character whose relationship with government is limited to a commercial interaction such as the sale of services.[16] Rather, TSSAA is primarily composed of, controlled by,[17] and

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[16] *Contrast Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (privately owned nursing home with state Medicaid contract not a state actor).

[17] See notes 32-35 and accompanying text, *infra*.

exclusively governed by public entities and public officials whose single mission is the regulation of interscholastic athletics of Tennessee's schools.

The "proscription on state action applies de facto as well as de jure." *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974). The protection of a private realm beyond constitutional scrutiny does not extend to "sham arrangement[s]" that attempt to disguise as "private" governmental conduct carried out by public officials. *See Rendell-Baker*, 457 U.S. at 842 n.7. Where challenged conduct is performed by public employees acting in their official capacity, as herein, that conduct is presumptively state action. *West*, 487 U.S. at 49-50. [18]

The state-action status of entities does not turn on an organization's self-description. It is the "nature" of an organization that "determin[es] the constitutional rights of citizens affected by its actions," *Lebron*, 513 U.S. at 392, not the "labeling of an activity." *Mistretta v. United States*, 488 U.S. 361, 393 (1989).[19]

This principle applies to hollow formalistic transfers of authority from public to nominally private officials.[20] And it

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[18] As a general principle of state-action doctrine, "a public employee acts under color of state law while acting in his official capacity." *West v. Atkins*, 487 U.S. at 50. *See infra*, Argument Section I.A.2; *Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957), *infra* note 32.

[19] *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267-69 (1991)(where Board of Review with power to veto decisions of airport authority is composed of "members of congressional committees charged with authority over air transportation," separation-of-powers issues are implicated, even if the "Members of Congress ... serve on the Board nominally 'in their individual capacities'" because constitutional status "does not turn on the labeling of an activity" but on the functional realities and on who controls actual selection)(internal quote omitted).

[20] *Evans v. Newton*, 382 U.S. 296, 301 (1966); *accord, Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) (nominal transfer of control of a park from public to private trustees "had not ... eliminated the actual involvement of the city" and therefore did not change the state-action status of the park there in question).

applies to the use of other "sham arrangement[s]" such as delegation[21] or use of the corporate form by public officials. Neither state nor federal government may "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron,* 513 U.S. at 397.

As a private school with a religious tradition, petitioner surely endorses the fundamental constitutional distinction between private conduct and conduct by or fairly attributable to the government – a distinction that allows schools such as petitioner to survive and thrive. But a concern about preserving an "area of individual freedom" has relevance only if the conduct at issue is "fundamentally a matter of private choice and not state action." *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting).

Such a concern about protecting an autonomous private realm has no place in the context of this case where no bona fide private organization or private realm exists. Here, public officials under the umbrella of TSSAA act collectively and in their official capacity; they pursue a governmental regulatory objective in governing an integral part of the state's system of public education – interscholastic athletics (and, indeed, TSSAA has no independent "private" non-regulatory purpose or character); they regulate schools directly and definitively, and, in so doing, they inhibit private conduct – school choice – by suppressing the First Amendment rights of private schools to inform prospective students about the advantages and opportunities available at private schools. See CP 46-B. Under the circumstances, regulatory decisions of TSSAA do not reflect "the exercise of private choice," *Lebron*, 513 U.S.

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[21] For example, government cannot avoid its constitutional accountability by delegating to private parties the provision of services that a state's "constitution or statutory scheme obligates the State to provide." *American Mfrs. Mut. Ins. Co., v. Sullivan*, 119 S. Ct. 977, 988 (1999). Otherwise, the state could "contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied." *West v. Atkins*, 487 U.S. 42, 56 n.14 (1988)(internal quote omitted).

at 412 (O'Connor, J., dissenting), and therefore do not warrant the constitutional shield of private status.

C. The School Choice Concern

TSSAA's Recruiting Rule substantially restricts the ability of independent and parochial schools to seek out students by informing them of educational opportunities. It also makes it more difficult for students and parents to learn about alternative educational options, including financial aid.

TSSAA's Recruiting Rule far transcends the athletic context since it applies to athletes and non-athletes alike and restricts both school representatives and unaffiliated persons. Unless an independent school is willing to avoid interscholastic athletics or to ban students it recruits generally from interscholastic athletics, it (and the potential students) are compromised. This blow against school choice is struck on behalf of the state by public school officials who join together to form an association the Sixth Circuit deemed private but in reality is governmental in nature, exercising regulatory authority over interscholastic athletics for the entire state. By implementing the various bans on student recruitment – and focusing on students with and without an athletic record – TSSAA is limiting opportunity, not guarding against "undue influence."

A problem with public education has been the occasional mind-set that the public schools have a proprietary interest in the students of a community. But government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships even at the expense of the child's overall welfare. Students are not objects for use by the state to achieve communal goals.[22]

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[22] Cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), teach that the liberty of the student and the student's family is the appropriate unit of concern and is afforded constitutional primacy. Government cannot constrain what a student learns. Parents, not the state, ultimately control the nature and scope of educational

Maintaining a competitive balance in athletics does not justify suppressing speech and thereby restricting educational opportunity for students.[23]

In the current context, TSSAA, as agent of and on behalf of state and local government, has apparently determined that independent schools pose a threat to public education. Rather than viewing independent schools as a means of enhancing educational options available to the students of the state – placing more choices on the educational menu for students and their families – TSSAA has sought to circumscribe and even foreclose opportunities for many youngsters who may not be aware of independent school alternatives or who may mistakenly believe that independent school enrollment is financially unattainable.

Instead of acting in the students' best interests by encouraging communication about educational opportunities, TSSAA views students as a means to an end – a championship for a public school team – and disrespects the primacy of student and family choice in education. TSSAA flatly bars any independent school from "contact[ing] students enrolled at the public schools." CP 39-B. TSSAA assumes that it is appropriate and desirable to establish and maintain a sort of Berlin Wall around public school students, ostensibly protecting them against the undefined use of "undue influence," but in reality inhibiting parents and students from learning about educational options they have a right to discover and embrace. The state-action decision of the Sixth

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opportunity for children, at least outside the public school curriculum. There are limits to how far states can go "to foster a homogeneous people." 262 U.S. at 402. When Oregon required all students to attend public schools, this Court pointedly observed that "[t]he child is not the mere creature of the State" and that the state had no "general power ... to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535.

[23] For further elaboration of these points, see Petition for Writ of Certiorari at 11-14.

Circuit allows public school officials to effectuate that objective without constitutional accountability.[24]

D. The Accountability Concern

Under the Sixth Circuit's decision, the regulatory conduct of a high school athletic association is not subject to constitutional scrutiny. Claims of race, sex, or religious discrimination would be constitutionally unreviewable.

This is particularly troublesome because TSSAA and comparable organizations have a track record that raises concerns about the lack of accountability. This includes such things as retaliatory conduct,[25] racial segregation,[26] unreasonable refusal to waive rules adversely affecting

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[24] The district court held that TSSAA "does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." CP 46-B. Indeed, the "State's interest. . .is the reverse. The State has a profound interest in students making informed choices about education." *Id.* at n.18. Thus, "it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side. . .by suppressing the speech of the other. . . . TSSAA cannot control school choice through censorship." CP 46-B.

[25] In *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990), a student with a disability transferred schools to receive a free appropriate public education to which he was entitled under federal law. TSSAA's transfer rule barred the student from participating in interscholastic athletics, and TSSAA was unwilling to waive that rule. A federal court ordered the school to admit the student and to allow him to play interscholastic athletics. When the district court's injunction was vacated on procedural grounds, TSSAA in retaliation ordered the school to forfeit all games in which the student had played, "as well as all championships and trophies, which resulted from those games." *Id.* at 756 The court barred that forfeiture on the ground that TSSAA could not penalize the public high school for obeying a federal court order. *Id.* at 760-61, *aff'd.*, 1990 U.S. App. LEXIS 12511 at *10-11 (6th Cir. 1990).

[26] *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968).

students with a disability,[27] and refusal to allow girls to try out for the boys' cross-country team when no girls' cross-country team exists.[28]

Without constitutional scrutiny, TSSAA is likely beyond federal accountability. Title IX, which bars gender discrimination, and Title VI, which bars race discrimination, do not appear to apply to high school athletic associations such as TSSAA. *See NCAA v. Smith*, 119 S. Ct. 924 (1999)(holding Title IX inapplicable to NCAA); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)(noting Title IX was patterned after Title VI). If the Sixth Circuit ruling stands, it could dramatically change the landscape of legal accountability for entities like TSSAA nationwide.

## SUMMARY OF ARGUMENT

Two sets of functional relationships are important in understanding the state action status of high school athletic associations such as TSSAA. The first is the local-level set of relationships that involves TSSAA, local officials who largely comprise its membership, who control, and who exclusively comprise the governance of the organization, and the local public schools responsible for providing public education in the state. The second is the state-level relationship between TSSAA and the SBE, which is the state agency responsible for statewide governance of the system of public education.

The Sixth Circuit misperceived the nature of the state-level analysis under this Court's cases, *see, e.g., West v. Atkins*, 487 U.S. 42, 55-56 (1988), and ignored entirely the local-government-level relationships, thereby running afoul of *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

The regulatory conduct of high school athletic associations is state action for four basic reasons.

1. Membership and Control. High school athletic associations are made up of local public schools and school

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[27] *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 579 (1999).

[28] *Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922 (8th Cir. 1976).

officials (typically public school principals) who, acting jointly and collectively, regulate high school athletics and control policymaking and decisionmaking. An association that is largely composed of local public schools and public school officials of a single state, that is controlled and exclusively governed by local public officials, and that exercises regulatory control over interscholastic athletics – an integral component of a state-mandated obligation – cannot shed its necessarily public character by calling itself a private, voluntary organization. *Tarkanian*, 488 U.S. at 193 n.13 (noting that the regulatory conduct of a high school athletic association would be state action where the "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign"). *See* note 19, *supra*, and accompanying text. Under this analysis, the identity of the school being regulated – whether it is public or private – is analytically irrelevant.

2. Joint Participation. Private persons who act jointly with public officials are acting under color of state law. *Lugar*, 457 U.S. at 941. Even if TSSAA is deemed a "private" entity, which petitioner disputes, it acts jointly with the public officials who control it, and, under the joint participation principle, acts under color of state law.

3. Delegation. Interscholastic athletics constitute an important part of a high school's program and a considerable part of its budget. Every state's constitution imposes a duty on government to maintain a public school system. When the state (through the SBE [state-level] or through public schools and their officials [local-level]) explicitly or implicitly delegates a portion of that responsibility – regulating and coordinating interscholastic athletics and determining which schools can compete against public schools and on what terms – to a separate entity, the state cannot escape ultimate constitutional responsibility for the conduct of that entity. *See West v. Atkins*, 487 U.S. 42, 55-56 (1988) (where state has a duty to provide a service, it cannot deprive injured parties of constitutional recourse by delegating provision of the service

to a private party); *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. 977, 988 (1999) (reaffirming *West*'s delegation principle where state's "constitution or statutory scheme obligates the State to provide" services); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (that state delegates "some portion" of a constitutional or statutory duty to a private party "does not change the governmental character of the power exercised").

4. Significant Encouragement. TSSAA's regulatory conduct is state action because TSSAA has received "significant encouragement" from the state, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), in the form of "overt, significant assistance" of government officials, *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988), and because the state has identified itself with TSSAA to such a degree that TSSAA's conduct bears the state's imprimatur. *Edmonson*, 500 U.S. at 621-22, 628.

## ARGUMENT

### I. This Court's Analysis in *Tarkanian* Requires Reversal

*NCAA v. Tarkanian*, 488 U.S. 179 (1988), dealt with the state-action status of NCAA in the context of a disciplinary proceeding involving Coach Tarkanian and the University of Nevada, Las Vegas (UNLV). A national organization of public and private colleges and universities, NCAA adopts rules that govern intercollegiate athletics. Tarkanian violated NCAA rules, and NCAA threatened UNLV with sanctions if Tarkanian was not disciplined. UNLV disciplined Tarkanian, who sued NCAA, claiming it was a state actor in its disciplinary role vis-à-vis UNLV.

Three distinct analytical approaches to the state-action issue were considered in *Tarkanian*. First, "the relationship between UNLV and the NCAA regarding the NCAA's rulemaking" was analyzed. *Id.* at 193. That component of *Tarkanian* focused on NCAA's composition and issues of control, with the analysis aimed at understanding the nature of the organization. Second, *Tarkanian* considered the contention that "NCAA's ... enforcement proceedings ...

constituted state action because they resulted from a delegation of power by UNLV." *Id.* at 195. Third, the *Tarkanian* dissent viewed the issue as whether private parties such as NCAA "could be held to be state actors in cases in which the final or decisive act was carried out by a state official." *Id.* at 200. Under the "joint participation" cases, private parties can be state actors when "jointly engaged with state officials in the challenged conduct." *Id.* (internal quote omitted). The dissent would have found NCAA to be a state actor because it "acted jointly with UNLV in suspending Tarkanian." *Id.* The majority was unpersuaded by the "joint participation" theory in the context of that case. *Id.* at 196 n.16.

A. The Regulatory Conduct of TSSAA Constitutes State Action

The regulatory conduct of an organization that establishes and enforces the rules by which both public and private high school teams and players compete throughout the state, whose membership consists of institutions within the same state, many of them public institutions created by the same sovereign, and whose regulatory conduct is controlled by those public institutions and their officials constitutes state action. *Id.* at 193 n.13. The composition of TSSAA, its mission, and its governance structure belie the claim that TSSAA is a "private" organization.

1. The Analysis in *Tarkanian* and Footnote 13

In *Tarkanian*, this Court held that NCAA was not a state actor when it made and enforced rules and regulations governing intercollegiate athletics. UNLV, which employed Tarkanian, was a member of NCAA, "participated in promulgating the Association's rules," and therefore "had some impact on the NCAA's policy determinations." *Id.* at 193. But neither UNLV nor Nevada controlled NCAA. UNLV was only one of the "NCAA's several hundred other public and private member institutions," and each of those other institutions (located outside Nevada) "similarly affected those policies." Those non-Nevada institutions "did not act

under color of Nevada law," and, therefore, NCAA's promulgation and enforcement of rules and regulations were not fairly attributable to Nevada. NCAA's members, "the vast majority of which were located in States other than Nevada," were the true "source" of the rules and regulations adopted by NCAA, and the organization influenced by those member institutions (NCAA) was "independent of any particular state." *Id.* Nevada, through UNLV, had only a "minor role in the[] formulation" of NCAA's rules and regulations and in their implementation. The conduct of NCAA could not fairly be attributed to Nevada. *Id.* at 195.

Whereas NCAA was not controlled by or sufficiently influenced by any governmental institution of Nevada to warrant attributing its conduct to Nevada, this Court recognized that "[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* at 193 n.13.

The clear reason for the difference is that, within a single-state athletic association, the members who control the regulatory conduct of the association are public officials from the same state. They have more than a "minor role in the[] formulation" and implementation of association policy. *Id.* at 195. The "collective membership" are not "independent of any particular State." *Id.* at 193. Rather, public schools and their officials from within an individual state largely run and control those organizations, so that the organizations are properly viewed as vehicles through which "public institutions created by the same sovereign," *id.* at 193 n.13, act "collective[ly]" and constitute the true "source" of the policies adopted and implemented. *Id.* at 193. The regulatory conduct of associations such as TSSAA is "fairly attributable" [29] to the state in which they are located.[30]

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[29] In view of their exercise of a regulatory function regarding an integral component of a state's educational process – interscholastic athletics – and given their composition, governance, and the resulting control by public institutions and their officials, *see Metropolitan Washington Airports Auth.*,

2. Conduct of Public Officials Acting in an Official Capacity and of Organizations They Control Is Presumptively State Action

The analysis in *Tarkanian* is supported by this Court's cases that hold that, as a general rule, "a public employee acts under color of state law while acting in his official capacity." *West v. Atkins*, 487 U.S. at 50; *accord*, *Lugar*, 457 at 935 n.18 ("[S]tate employment is generally sufficient to render the defendant a state actor"); *id.* at 937 (a person may "fairly be said to be a state actor ... because he is a state official"); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 n.5 (1978)("The involvement of a state official ... plainly provides state

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501 U.S. at 265-69, these associations may fairly be seen not as private entities at all but as "Government itself." *Lebron*, 513 U.S. at 378. *See id.* at 396-97, 399 (emphasizing that the "Government exerts ... control [over Amtrak] ... as a policymaker"]. An association largely composed of and controlled by public officials of a single state cannot shed its public character by calling itself a voluntary organization. *Cf. id.* at 392-93 ("If Amtrak is, by its very nature, what the Constitution regards as the Government," then it is subject to the First Amendment "whatever congressional label" is attached, and a statutory disclaimer of governmental status is of no constitutional effect).

[30] *Tarkanian*, 488 U.S. at 193 n.13, cited favorably two circuit court decisions holding that the regulatory conduct of high school athletic associations constituted state action. *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982); *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968). *Clark* was a challenge to a policy of the Arizona Interscholastic Association (AIA) that precluded boys from playing on girls' interscholastic volleyball teams in Arizona high schools. 695 F.2d at 1127. *St. Augustine* was a parochial school's challenge to a racially segregated system of interscholastic high school athletics maintained by LHSAA.

In reviewing *Clark* and *St. Augustine*, the district court identified nine factors that those courts had found important in determining that the regulatory conduct of a high school athletic association constituted state action and concluded that "[a]lmost identical factors are present in this case." CP 30-31-B. *See also Kelley v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968)(relying on *St. Augustine* to find that the regulatory conduct of TSSAA constituted state action and concluding that TSSAA "is an instrumentality of the state for purposes of the Fourteenth Amendment").

action")(internal quote omitted). TSSAA's regulatory conduct constitutes state action because an entity which, like TSSAA, is controlled and governed by public officials who serve in an ex officio capacity while performing regulatory functions,[31] presumptively operates under color of law.[32] See note 18, *supra*.

Thus, TSSAA's constitutional status is determined by those who control the entity, in this case public officials. *See Lebron*, 513 U.S. at 399 (focusing on nature of government control over Amtrak and fact that government "controls the operation of the corporation through its appointees" in concluding that Amtrak is agency or instrumentality of federal government subject to First Amendment scrutiny).[33]

That TSSAA is controlled and governed by public officials who serve in an ex officio capacity is clear. Eligibility for election to the TSSAA Board of Control and its Legislative Council is based on official status and is limited to high school principals, assistant principals, or qualified superintendents. JA-89, 92; CP 5-B. Public high school administrators who serve on the Legislative Council and the Board of Control attend the meetings as part of their official

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[31] The specifics of the contractual arrangements are not determinative. "It is the ... function within the state system, not the precise terms of ... employment" that determines whether the conduct "can fairly be attributed to the State." *West v. Atkins*, 487 U.S. 42, 55-56 (1988).

[32] See *Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957) (holding that Girard College, which had been built and maintained pursuant to a privately erected trust, was a state actor because it was operated and controlled by a board of state appointees, which was itself a state agency). *Cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 269 (1991)(effective control determines nature of entity in separation-of-powers context).

[33] *Cf. id.*, 501 U.S. at 269 & n.15 (holding that Congress' "effective control" and not just its "formal appointment and removal power" is critical in determining the constitutional status of a board that can exercise veto power over an airport authority); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)(holding that power of removal, even if not exercised, provided Congressional control over Comptroller General and constitutionally determined the legislative nature of the office).

duties – *i.e.*, on school time when the meetings occur while school is in session – and are typically reimbursed for expenses by their schools for attendance at meetings. JA-39-40, 298. Schools voting for members of the Board of Control or Legislative Council must be represented at the meeting where the election takes place by the school's "principal, or other faculty member." JA-89, 92. All the voting members of the Legislative Council and the Board of Control were public school employees/administrators when petitioner was disciplined. JA-24, ¶15.[34] The voting membership of TSSAA is 84% public schools and public school officials. The control of TSSAA is therefore entrenched in the hands of public officials, thereby establishing its constitutional status as a state actor.[35]

In only one case, *Polk County v. Dodson*, 454 U.S. 312 (1981), has this Court "determined that a person who is employed by the State and who is sued under §1983" while "acting in his official capacity" was not operating under color of state law. *West v. Atkins*, 487 U.S. at 50. In *Polk County*, a public defender employed by government was found not to act under color of state law because, in the defense attorney's traditional role, the public defender "is not acting on behalf of the State; he is the State's adversary." 454 U.S. at 322 n.13. *Polk* has no application here.

A functional analysis determines whether a public employee or an organization largely composed of and controlled by public employees acts under color of state law. *Id.* at 324-25 (public defender acts under color of state law in performing non-criminal-defense roles such as "making hiring

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[34] *Cf. Metropolitan Washington Airports Auth., supra* note 19.

[35] Whether the public officials who control TSSAA choose to elect one or more private school representatives to either the Board of Control or the Legislative Council is irrelevant, as the control (not its exercise) is determinative of the constitutional status of TSSAA. See *Metropolitan Washington Airports Auth.*, 501 U.S. at 269 n.15 (noting that control is critical element in determining an institution's constitutional status, not whether such control is exercised in a particular manner, which is "irrelevant"); *Bowsher v. Synar*, 478 U.S. at 730 (same).

and firing decisions on behalf of the State").[36] In this case, TSSAA performs only one type of function – it regulates interscholastic athletics, an integral component of the state's educational system, on behalf of public schools and directly controls who plays interscholastic athletics against all public high schools in Tennessee and upon what terms. It is not acting as the state's adversary but is acting on the state's behalf, "carry[ing] a badge of authority of [Tennessee] and represent[ing] it." *Tarkanian*, 488 U.S. at 191 (internal quote omitted). TSSAA's regulatory conduct directly affects those such as petitioner who are subject to its authority. TSSAA is "acting on behalf of the State," *Polk County*, 454 U.S. at 322 n.13, serving as an "agent" of the state. *Tarkanian*, 488 U.S. at 196.[37]

In sum, the function of TSSAA is regulatory, controlling an important component of the state's educational program. A private school seeking to play interscholastic athletics with a public school must secure the approval of TSSAA's Executive Director and comply with applicable TSSAA standards. TSSAA is clearly not a sports club or a coaches' association, which has no regulatory authority. TSSAA plays an important regulatory role as the gatekeeper and coordinator of interscholastic athletics. Its regulatory and adjudicative decisions are authoritative not just advisory.[38] TSSAA's regulatory function provides no basis for excluding it from the presumptive state-actor status that follows from its being an organization governed and controlled by (local) public officials.

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[36] For additional authority on the importance of a functional analysis, see cases cited at note 44, *infra*.

[37] TSSAA is an agent of the state not only because it is governed and controlled by local public school officials but also because it was designated at the state level by the SBE as its agent in coordinating and regulating interscholastic athletics statewide. See CP 23-27-B.

[38] *Cf. American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. at 987(decision of utilization review organization, a private organization not controlled by governmental officials but charged with making medical necessity decisions in a state's workers compensation program, is state action).

Under the circumstances, regulatory decisions of TSSAA do not reflect "the exercise of private choice." Given TSSAA's role and mission, its structure and composition, and the regulatory function that it performs on behalf of the state and local levels of government, TSSAA's regulatory conduct necessarily results from "state influence or coercion." *Lebron*, 513 U.S. at 412 (O'Connor, J., dissenting).

3. The Public or Private Status of the Institution Being Regulated Is Analytically Irrelevant Under *Tarkanian* Footnote 13

The Sixth Circuit distinguished *Tarkanian* footnote 13 on the ground that it did not attach state-action status to TSSAA's regulatory conduct when, as in this case, TSSAA regulates a private school such as petitioner.[39] 180 F.3d at 766. "This analysis misapplies the reasoning in *Tarkanian.*" *Communities for Equity*, 80 F. Supp.2d at 742.

An important issue that divided the *Tarkanian* majority from the dissent was whether UNLV's adverse employment actions and NCAA's recommendations were so coordinated that they should be considered "joint actions." If they were, then NCAA (a private organization under this scenario) would be deemed a "joint participant" with UNLV (a public entity under this analysis), and NCAA's conduct would be deemed state action. *See Dennis v. Sparks*, 449 U.S. 24 (1980) (private parties bribing and conspiring with a judge held to be acting under color of state law).

The dissent found the "joint participation" theory persuasive and would have found NCAA to have acted under color of state law. 488 U.S. at 200-02 & n. 2. The majority, on the other hand, was unpersuaded by the "joint participation" approach under the circumstances of that case. "NCAA cannot be regarded as the agent of UNLV" because

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[39] The Sixth Circuit's rationale was that in footnote 13 this Court "note[d] that all nine justices agreed that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" 180 F.3d at 766.

UNLV was "at odds with" NCAA regarding the disciplinary action against Tarkanian. *Id.* at 196.

The Court found persuasive the analogy to the state-action status of a public defender. See *Polk County v. Dodson*, 454 U.S. 312 (1981). A public defender does not act under color of state law when defending against a criminal prosecution because the public defender acts against the state-as-prosecutor not on the state's behalf. *Id.* at 320. In *Tarkanian*, the interests of NCAA and UNLV did not coincide; "rather, they ... clashed throughout the investigation, the attempt to discipline Tarkanian," and the ensuing litigation. "UNLV and the NCAA were antagonists not joint participants, and the NCAA may not be deemed a state actor on this ground." 488 U.S. at 196 n.16.

Under the dissent's "joint participation" theory, NCAA would not act under color of state law if it acted jointly with a private university in enforcement of a disciplinary action. In such a situation, two private parties would be acting together, and there would be no state action. *Id.* at 202 n.2 (dissent).

As discussed *supra*, a different state-action theory considered in *Tarkanian* was whether UNLV exercised such control over NCAA that NCAA policies and actions were state action, fairly attributable to Nevada. *Id.* at 193. The majority observed that NCAA was a national organization, composed of hundreds of public and private colleges and universities from across the country. Those institutions were the "source of the legislation adopted by the NCAA," and the "vast majority ... were located in States other than Nevada." Thus, the NCAA's "collective membership" controlled the NCAA, and that membership was "independent of any particular state." Under the circumstances, NCAA did not act "under color of Nevada law," as the control of NCAA could not be fairly attributed to Nevada or to any single state given the national composition of NCAA's membership. *Id.*

Footnote 13 enters at this point. The Court noted that, with respect to the "membership" theory of state action, which

focuses on where control of an entity rests, the "situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." By its approving citation of two cases[40] involving the state-action status of the regulatory conduct of high school athletic associations, the Court clearly contemplated a situation such as the one involved herein. Indeed, one of the two cases cited, *St. Augustine*, involved a *private* school's challenge to alleged racial discrimination on the part of LHSAA in carrying out its regulatory function.

The next sentence of footnote 13 noted that "[t]he dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership." The Court cited footnote 2 of the dissent, in which the dissent had explained that under its "joint participation" theory, NCAA would not be a state actor in enforement matters involving private NCAA members.

From that innocuous acknowledgment of an area of agreement between the majority and the dissent, the Sixth Circuit carved out a broad and unwarranted exception unsupported by footnote 13 and, really, unsupported by any analysis at all. The court held that the regulatory conduct of TSSAA did not constitute state action when it regulated private schools. This does not follow at all from footnote 13.

Footnote 13 dealt with the membership/control analysis of state action, unchallenged by the dissent. That the dissent's "joint participation" analysis would not apply when the school being regulated is a private school simply has no bearing on this Court's membership/control analysis of a high school athletic association such as TSSAA, in which the public or private status of the school being regulated is analytically irrelevant. The Sixth Circuit "misapplie[d]" and "misstate[d]

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[40] See note 30, *supra.*

the ... reasoning in *Tarkanian* [footnote 13]." *Communities for Equity*, 80 F. Supp.2d at 742

In sum, TSSAA acted under color of law when it formulated and directly enforced the Recruiting Rule because of the nature of its composition and governance. Control over TSSAA is exercised by public schools and their officials who are public employees and who serve a regulatory function in their ex officio capacity as public school officials. The public or private status of the institution being regulated is analytically irrelevant for determining TSSAA's state-action status under *Tarkanian* footnote 13.

B. Government May Not Absolve Itself of Constitutional Accountability By Delegating a Function It Is Obligated to Provide

In *Tarkanian*, this Court stated that "[i]t is, of course, true that a State may delegate authority to a private party and thereby make that party a state actor." 488 U.S. at 195. Where a state's "constitution or statutory scheme obligates the State to provide" a service, *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S. Ct. at 988, the state may not delegate its responsibility so as to "leave its citizens with no means for vindication" of their rights. *West v. Atkins*, 487 U.S. at 56 n.14. "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution" by delegating those obligations to a "private" entity. *Lebron*, 513 U.S. at 397. *Cf. Edmonson.*, 500 U.S. at 626 (that state delegates "some portion" of a constitutional or statutory duty to a private party "does not change the governmental character of the power exercised").

Nor may government absolve itself from a duty by "contracting out" its responsibility. Those harmed by the regulatory conduct of the delegatee cannot be deprived of their "means to vindicate" their constitutional rights. *West*, 487 U.S. at 56. If this were not the case, the state would be "free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been

delegated to 'private' actors, when they have been denied." *Id.* at n.14 (internal citation omitted).

In this case two types of delegation have occurred, even assuming that TSSAA is a "private" entity to begin with. First, at the local level, public schools have delegated to TSSAA responsibility for determining who can schedule games against public schools and the terms upon which those contests can proceed. Second, at the state level, the SBE has explicitly and implicitly designated TSSAA as its agent for regulating interscholastic athletics, a component of Tennessee's system of public education. With its board "consist[ing] entirely of public school officials," TSSAA is the government's "agent for controlling an important, highly visible[41] component of its statewide educational program – inter-school athletics." 190 F.3d at 707 (dissent).

Local-level Delegation. If a public school announced a policy that it would not play interscholastic athletics against a private school that exercised its rights of free expression in a certain way, that decision would be subject to constitutional scrutiny. In this case, all 290 public schools in Tennessee that participate in interscholastic athletics, acting jointly and collectively, have delegated the authority to suppress petitioner's speech to a nominally private entity they control to set those eligibility standards (through adoption of the challenged Recruiting Rule). Delegation of this decision in this manner does not absolve these local public schools and their officials of constitutional accountability, nor does it deprive a victim of censorship such as petitioner of its claim to constitutional recourse.

The local-level delegation to TSSAA establishes TSSAA as ultimate adjudicator, much like the utilization review organization (URO) in *American Manufacturers*. The URO, a truly private entity, was given responsibility under state law to

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[41] Public school teams play on public school fields, in school uniforms, and with cheerleading squads bearing official school insignia. Public schools transport students to interscholastic events in school buses bearing the markings of the public school or the school district.

determine medical necessity in the state's workers compensation scheme. The designation of UROs to perform that task turned their decision into state action. 119 S. Ct. at 987. In this case, TSSAA has final authority to formulate, implement, and adjudicate compliance with the Recruiting Rule. Its sanctions against petitioner are final and its decisions are binding on all TSSAA members. TSSAA is an "agent" of its members, largely public schools, in carrying out their responsibility to regulate an important component of their educational program. *Tarkanian*, 488 U.S. at 196. Under *American Manufacturers*, TSSAA's regulatory decisions are surely attributable to the state.

In *Tarkanian*, this Court noted that government does not confer state-action status on a private entity when it adopts rules recommended by that private entity. 488 U.S. at 194. For example, a state supreme court is constitutionally accountable for formulating and enforcing disciplinary rules on its members. However, a state supreme court's adoption of bar-association-recommended rules does not transform the conduct of the bar association into state action when the court "retain[s] plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own." *Id.* (discussing *Bates v. State Bar*, 433 U.S. 350 (1977)).

However, consider what would happen if a state supreme court did not just accept a recommendation from a private entity but delegated authority over bar discipline to that entity to make decisions as a governmental proxy.

Tennessee's supreme court, which has five members, is responsible for bar admissions. Assume that that court created a nominally private Bar Regulation Entity (BRE) with its own charter. Membership consisted of the five members of the state supreme court and the president of the Tennessee Bar Association. Under such an arrangement, 83% of the membership of the organization would be state supreme court justices and 17% would be a private individual (comparable to the compositional statistics for TSSAA). Could the Tennessee supreme court evade its obligations under *Bates* by

delegating regulatory authority to BRE to establish a ban on attorney advertising, which *Bates* held to violate the First Amendment? This, in effect, is what the local public schools have done in organizing TSSAA and empowering it to regulate interscholastic athletics by suppressing expression. It surely transgresses the delegation principles established in *West* and *American Manufacturers*, impermissibly allowing government to "evade the most solemn obligations imposed in the Constitution," *Lebron*, 513 U.S. at 397, and impairing the ability of persons adversely affected "to vindicate" their basic First Amendment rights. *West*, 487 U. S. at 56 & n.14.

State-level Delegation. At the state level, SBE is largely responsible for administering the state's system of public education. SBE has delegated responsibility for regulating interscholastic athletics to TSSAA. For the 24-year period 1972-96, that delegation was explicit by SBE rule. Prior to 1972 and since 1996, that delegation has been implicit through "custom and practice."[42] Throughout the period, "Tennessee ... has recognized TSSAA as the official body for the regulation and control of interscholastic athletics." CP 27-B.

Tennessee's Constitution, Article XI, Section 12, requires the state to "provide for the maintenance, support and eligibility standards of a system of free public schools." The "responsibility for designing and maintaining a free public school system rest[s] on the General Assembly." *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993). In *Small Sch. Systems*, the court held the system of financing public education in Tennessee unconstitutional under the state constitution. The unequal funding of different school systems was justified by the state on the ground that Tennessee had chosen to rely on local taxation as a means for paying for a large part of public education. Since the tax

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[42] §1983 applies to custom and practice as well as to formal governmental conduct. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162-69 (1970).

bases of different school systems varied, the funding levels would necessarily vary.

In response to that argument, the Tennessee Supreme Court held that delegation of financing of public education to local units of government did not abrogate the "duty specifically imposed upon the General Assembly by the [Tennessee] constitution." *Id.* at 156. Therefore, under Tennessee law, it is the ultimate responsibility of the state to retain accountability for the administration of the public school system. *Cf. American Manufacturers*, 119 S. Ct. at 988 (noting that state's delegation of services a state's "constitution or statutory scheme obligates the State to provide" does not absolve it from constitutional scrutiny); *West*, 487 U.S. at 55 & n.13 (same).

If delegation to local units of government is not a sufficient basis for exonerating the state for the consequences of that delegation, surely delegation to TSSAA cannot insulate the state from ultimate responsibility and accountability. The state may choose to delegate regulatory responsibility and standard-setting to TSSAA, but that is not a means by which the state can avoid ultimate responsibility and accountability for the impact on regulated entities such as petitioner whose ability to compete against public schools is adversely affected.

The state-level delegation to TSSAA has another important effect. It identifies the state with TSSAA's conduct, giving the state's imprimatur to the TSSAA. The extent to which TSSAA "relies on governmental assistance and benefits" is an important component of state-action analysis. *Edmonson*, 500 U.S. at 621. When "private parties make use of . . . the overt, significant assistance of [government] officials, state action may be found." *Tulsa Professional Collection Servs.*, 485 U.S. at 486.

Where the state is identified with private conduct, it may not "effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them." *Burton v.*

*Wilmington Pkg. Auth.*, 365 U.S. 715, 725 (1961). The activities regulated and sponsored by TSSAA typically take place in public, "state-owned facilities," JA-41, ¶25, and financially support TSSAA. *Id.* SBE monitors and oversees the conduct of TSSAA, and TSSAA administrators are "considered as teachers" and participate in the public employee retirement system. JA-39, ¶21. And, of course, TSSAA itself is run and controlled by local-level public officials serving ex officio. SBE's explicit and implicit delegation of regulatory authority to TSSAA has placed the state's imprimatur on TSSAA's regulatory conduct and made the identification of TSSAA with the state unmistakable. "[R]egardless of how the TSSAA denominates itself as an organization, or how it characterizes its relationship with its member schools, 'it is abundantly clear that the association's very existence is entirely dependent upon the absolute cooperation and support of the public school systems' of the State of Tennessee" (internal quote omitted). CP 35-B

Thus, there is a high degree of interdependence between TSSAA (which claims to be a private party) and public school officials. Governed by public school officials and deferred to by local public school officials for carrying out "an important function within the government" – the regulation of interscholastic athletics, which is an integral component of the public education process and system – TSSAA certainly "act[s] with [government's] substantial assistance," *Edmonson*, 500 U.S. at 628, and heavily "relies on governmental assistance and benefits." *Id.* at 621.

The Sixth Circuit seemed to acknowledge the force of the delegation argument but rejected petitioner's state action claim, relying exclusively on SBE's 1995 rule change (recognizing rather than designating TSSAA and expressly and exclusively authorizing public schools to join TSSAA). For the Sixth Circuit, the revocation of explicit delegation was "fundamental" and "dictate[d] the outcome of the present case." 180 F.3d at 765-66.

The district court found the formal revocation of explicit delegation by SBE to be a hollow formalism in response to other cases holding TSSAA to be a state actor. CP 26-27-B. The revised rule "clearly singles out the TSSAA by name" to serve as "the official organization for supervision and regulation of secondary school athletics." *Id.* at 26-B. The "connections between TSSAA and the State are still pervasive and entwined." *Id.* Despite the changed rule, "[n]othing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed." That is, there was a "mere change in the words of the regulation, apparently to avoid a litigation claim of state action," but there was no change in the "actual conduct of the TSSAA." *Id.* at 26-27-B.

In relying exclusively on SBE's formal revocation of explicit delegation of regulatory authority to TSSAA, the Sixth Circuit did not address the functional realities[43] This was analytical error as this Court's cases have required such a functional analysis.[44] Judge Merritt's dissent properly decried

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[43] Petitioner does not rely on a "public function" theory of state action, which requires that the activity in question be an "exclusive" public function. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978). In contrast, the functional relationships involved in this case need not have been exclusively performed by government. *Compare Edmonson*, 500 U.S. at 621-28 *with id.* at 639-40 (O'Connor, J., dissenting).

[44] *See, e.g., Georgia v. McCollum*, 505 U.S. 42, 54 (1992)(state action status depends on "nature and context of function" being performed); *Edmonson*, 500 U.S. at 621 (consideration of whether an "actor is performing a traditional governmental function" an important factor in determining state actor status); *West v. Atkins*, 487 U.S. at 55-56 (state actor status of private physician who provided medical care by contract in state prison was determined by his "function[s] within the state system, not the precise terms of his employment," by examining the nature of the "relationship among the State, the physician, and the prisoner" not just the formal terms of the contract); *Polk County v. Dodson*, 454 U.S. at 321 (though employed by the state, public defender is not a state actor because of the "nature of his function" within the adversarial criminal justice system); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974) (Fourteenth Amendment's "proscription on state action applies de facto as well as de jure"); *Evans v.*

the failure of the Sixth Circuit to engage in a "'functional' analysis of the activity of the private ... agency in question to determine the degree of 'cooperation' between state and local officials and the actor and an analysis of the degree of 'coercion' exercised by the actor over persons under the control of a state or local governmental institution." 190 F.3d at 707.

For years, as a result of formally delegated authority, TSSAA has run a critical component of Tennessee's public education program. There continues in fact to be "entwined ... management or control," *Evans,* 382 U.S. at 301, between government and TSSAA, as well as substantial ongoing effects of years of actual and perceived inter-relatedness, as no substantial alteration of preexisting policies has taken place. *See Flagg Bros.*, 436 U.S. at 159 n.8. The structural relationship between TSSAA and SBE and the function performed by TSSAA result in state actor status for TSSAA. SBE's formal resolution regarding TSSAA in 1995 does not magically shift TSSAA from state actor to private status.

C. Even If TSSAA Be Deemed a Private Entity, It Acts Jointly With Public Officials and Under the Joint Participation Principle TSSAA Acts Under Color of State Law

When private persons act jointly with public officials, they act under color of law. "Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of §1983 actions." *Dennis v. Sparks*, 449 U.S. at 27-28.[45] It is enough that a private party

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*Newton*, 382 U.S. 296, 301-02 (1966) (public nature of racially segregated park, originally devised to City of Macon as trustee and which had been an "integral part" of the city's activities, could not be "dissipated ipso facto by the appointment of 'private' trustees," where there was no clear and demonstrable change in the substantive relationship of the city to the park; private trustees' conduct was state action).

[45] *See also Lugar*, 457 U.S. at 941 ("[A] private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor'"); *Rendell-Baker v. Kohn*, 457 U.S. at 838 n.6 (1982)(noting the importance for state action analysis of "whether

"is a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966).

*Tarkanian* rejected application of the joint participation theory in that case because this Court could not view NCAA as "an agent of UNLV" under the circumstances. 488 U.S. 196. The "relevant interests" of the state and private parties did "not coincide" as they do in the joint participation context. Rather, they "clashed throughout the [NCAA] investigation, the attempt to discipline Tarkanian," and in the subsequent litigation. Since "UNLV and the NCAA were antagonists, not joint participants," this Court declined to deem NCAA a state actor under the joint participation theory. *Id.* at n.16.

No such antagonism exists in this case. TSSAA is a joint venture among public officials and public entities involving an integral component of the public educational process. Even if TSSAA is (mis)characterized as a private entity, in carrying out its regulatory mission, it is acting in "joint participation" with public school officials that comprise its governance structure. Surely if private persons "jointly engaged with state officials in the challenged action" are acting under color of law, then *a fortiori*, public officials who act in concert with other public officials in a common venture whose conduct is subject to challenge are acting under color of law. And the common venture itself (TSSAA), which serves as the forum for and the vehicle for implementing the "joint participation," is also acting under color of state law. This makes the regulatory conduct of TSSAA state action – fairly attributable to the government.

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action was taken in concert with a state actor" and reaffirming that in certain circumstances "the acts of a private party are fairly attributable to the state ... when the private party act[s] in concert with state actors"); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of [§1983]."); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (where the state "has so far insinuated itself into a position of interdependence" with a private actor, the state "must be recognized as a joint participant in the challenged activity," which then becomes state action under §1983).

The counterargument – that TSSAA and its officials act in a "private" capacity, formulating and implementing regulatory rules for governing interscholastic athletics for all public schools in the state – is untenable. The local public officials who run and control TSSAA in their "private" capacity are the very same people who in their "day jobs" run the public schools and control their athletic programs. Then, these same people, now wearing their public school hats, act in their official capacity as public high school principals to dispassionately and independently judge the decisions they themselves have taken in their so-called "private" capacity. This is more the jurisprudence of Houdini than Holmes.

TSSAA officials are public employees representing their public schools within TSSAA. Composed and controlled as it is, by public schools and their officials, and performing a regulatory function, TSSAA formulates and enforces regulations (such as the Recruiting Rule). At the very least, those officials are acting jointly with and among themselves in their ostensibly distinct capacities. The "joint participation" is self-evident from the blurring of the roles. The contention that public officials acting through TSSAA should be deemed "private" actors when those very same people act upon and implement in their acknowledged public capacity the decisions they themselves took in the context of TSSAA just cannot withstand serious scrutiny.

II. Reversal Is Required Because TSSAA's Regulatory Conduct Is State Action As TSSAA Has Received "Significant Encouragement" from the State

State action arises when government "has provided such significant encouragement" to a nominally private decision that "the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). One way of establishing this type of "encouragement" is to determine "the extent to which the actor relies on governmental assistance and benefits," *Edmonson*, 500 U.S. at 620, whether a private party has received "the overt,

significant assistance of state officials." *Tulsa Professional Collection Servs.*, 485 U.S. at 486.

In this case, TSSAA "simply could not exist" without the "overt, significant participation of the government." *Edmonson*, 500 U.S. at 622. This type of government assistance has occurred at both the state and local levels.

TSSAA has supervised and regulated interscholastic athletics in Tennessee through "deference" from the state prior to 1972, by express designation and delegation of authority from SBE from 1972-1996, and, since 1996, by affirmative "recogni[tion]" and express, exclusive singling out on the part of the SBE. CP 23-37-B. Thus, TSSAA's regulation of high school interscholastic athletic competition and its enforcement of the challenged Recruiting Rule result from extensive "governmental assistance and benefits." *Edmonson*, 500 U.S. at 621. This governmental "deference," "designat[ion]," delegation, "recogni[tion]," and overall singling out of TSSAA for its special and unique role in regulating and supervising interscholastic athletic competition in Tennessee places a public imprimatur on TSSAA's activities. This is "significant encouragement" so that TSSAA's regulatory conduct "must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

In addition, at the local level, TSSAA's "'very existence is entirely dependent upon the absolute cooperation and support of the [local] public school systems' of ... Tennessee." CP 35-B (internal quote omitted). TSSAA would have no role without a close working relationship with the public schools, and its very composition and governance rely on the active participation of public school principals. This is a joint venture of public entities and public officials, and the work of TSSAA would be impossible to maintain in its current form without the "overt, significant assistance", of local public officials. It is hard to imagine a closer relationship than the one embraced in TSSAA where the very same people who formulate and enforce TSSAA rules and regulations are

themselves the public employees responsible for implementing those policies as part of their official duties in administering the state's public schools.

## CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed.

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